No. 05-1251

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In The

Supreme Court of the United States

ENRIQUE HERNANDEZ-CASTILLO,

Petitioner,

v.

ALBERTO R. GONZALES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner Enrique Hernandez-Castillo's petition presents to the Supreme Court a circuit split regarding whether there is a legal distinction between alien defendants who went to trial involuntarily and those who chose trial over a plea bargain, such that the latter can be found to have a reliance interest in the availability of relief from deportation under § 212(c) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (INA).

As we explained, the Third Circuit recognizes that electing to go to trial, and denying a proffered plea agreement, has a reliance interest in the availability of such relief, in the same way that an alien who accepted the plea agreement would have. The key here is that the alien chose to "alter [his] course in the criminal justice system in reliance on the availability of § 212(c) relief." (Resp. 8, quoting *Ponnapula v. Ashcroft*, 373 F.3d 480, 494 (CA3 2004).)

Respondents incorrectly assert that "Petitioner . . . did not decline a plea agreement," and point to the record in the District Court. (Resp. 8.) However, Petitioner did receive a plea offer, and he did decline such an offer *in reliance on the availability of § 212(c) relief* if at trial he was found guilty. (Pet. App. 9.) Evidence of this arrangement was not made available in the District Court, due to the challenges of obtaining an affidavit from Petitioner in a small rural town in Mexico, to which he had been deported. However, an affidavit was obtained, stating that he chose to reject the plea offered and that it was "[his] understanding at the time that [he] would be able to apply for immigration relief even if [he] were convicted of the charge." *Ibid.* This evidence was before the Fifth Circuit,

however its *relevance* was challenged. (Pet. App. 12, at 8 n.3.)

It is the logic of the Fifth Circuit's interpretation of this evidence that is challenged by Petitioner. The Fifth Circuit stated that it was "nonsensical" to equate the refusal to take a plea agreement with detrimental reliance on § 212(c) because that choice does not affect an alien's immigration status "[u]nless and until [he is] convicted." *Ibid.* However, it is clearly the case that an alien who elects to go to trial places himself on a path which can end in removal. Perhaps more importantly, even an alien who pleads guilty and becomes removable at the time of the plea is not automatically removed. For many such aliens, removal never occurs, and they continue to live legally in the United States for years, decades, even for the remainder of their lives. The fact that they *could* be put into removal proceedings, and *could* be found to be removable, is no more certain than that an alien *could* be found guilty and thus later *could* be found to be removable. An alien who chooses to decline a plea agreement and go to trial with the expectation that if he is found guilty, § 212(c) relief will still be available has a reliance interest in the availability of such relief, just the same as an alien who accepts the plea agreement does.

Respondents make three additional arguments for why the Supreme Court should not hear this case. All three are irrelevant.

First, Respondents note that the issue has "diminishing prospective significance," because it affects only "an ever-diminishing class." This is irrelevant because an unconstitutional application of a federal law is unconstitutional regardless of whether the pool of people harmed by

that application is growing or shrinking. Certainly this Court did not hesitate to consider the harm to only a single person when it considered *Bush v. Gore*, 531 U.S. 98 (2000).

Second, Respondents argue that it would be premature to consider this question while the Department of Justice is receiving comments on a proposed rule. (*See* Resp. 9.) The rule that is being considered would resolve the circuit split against Petitioner, and thus would be susceptible to the same constitutional challenge before the Court today. It is no argument that the Supreme Court should not hear a case merely because the Executive Branch is considering adopting a rule which would resolve the case when it is the constitutionality of such a rule that is being challenged. The Justice Department, unlike the Supreme Court, is not qualified to determine the constitutionality of this question, so this Court should not defer to it.

Further, for the sake of efficiency, it is better to resolve the constitutional issue now, so that the Justice Department would have such guidance as it determines whether to adopt the rule as currently framed, rather than to wait for the rule to be adopted and applied, and then bring a later challenge to it – making all the same arguments before the Court in this case.

Third, Respondents assert that in 1989, when Petitioner declined the plea agreement and chose to go to trial, there was "no distinct benefit in terms of eligibility for Section 212(c) relief in either going to trial *or* pleading guilty." (Resp. 10.) This assumes that the Petitioner was choosing between trial and the plea on the basis of § 212(c) relief alone; however, as Petitioner explains in

his affidavit, "I maintained my innocence at the time and still do, even though I recognize a jury did find me guilty." (Pet. App. 9, at 4.) For Petitioner, this was *also* a factor in his decision to decline the proffered plea agreement. Most decisions of this magnitude are made based on multiple factors, and for Mr. Hernandez-Castillo, the two most important concerns were his belief in his innocence and the availability of relief from removal. Had he been aware, in 1989, that a law enacted in 1996, would render him ineligible for such relief, the choice he made may well have been different. That is the very nature of reliance which this Court addressed in *INS v. St. Cyr*, 533 U.S. 289 (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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